Supreme Court, U. S.
FILED
SEP 10 1980
MICHAEL RODAK, JR., CLERK

No. 80-32

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

CLIFFORD J. HYNNING,
Appellant,

v.

DUFIEF MORTGAGE, INC., *et. al.*,
Appellees

On Appeal from the Supreme Court of Virginia

REPLY OF CLIFFORD J. HYNNING TO MOTION TO DISMISS

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THE CASILLAS PRESS, INC.–1717 K Street, N. W.–Washington, D. C.–223-1220

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Appellant, Clifford J. Hynning (hereinafter called the "partner") replies to the Motion to Dismiss by DuFief Mortgage, Inc. (hereinafter called "DuFief"). Bracketed page numbers will refer to the Motion to Dismiss.

1. Issue preclusion is relevant only if the Virginia statute is unconstitutional.

If the partnership statutes or rules of court of approximately half the states, including Virginia, are clearly constitutional, this appeal should be summarily dismissed.

Issue preclusion becomes a hurdle in this appeal only if the partnership statutes are unconstitutional. DuFief has now conceded [pp. 3-5] that the issue in the earlier Petition for Certiorari was *in personam* jurisdiction. DuFief, however, seeks to avoid consideration of the constitutionality of the Virginia statute by asking this Court to establish a precedent that an exercise of state court jurisdiction in violation of due process may be validated through issue preclusion. While the sovereign may confer preliminary jurisdiction to permit a court to determine whether it has jurisdiction, the sovereign does not have the power to permit or sanction the exercise of jurisdiction beyond due process. Just as due process imposes an outer limit on the exercise of state court jurisdiction, it likewise imposes an outer limit on issue preclusion. Consequently, the question of issue preclusion here is a matter of the U.S. Constitution itself and cannot be classified as a non-federal ground of the decision below.

DuFief cites *Stoll* v. *Gottlieb,* 305 U.S. 165, and *Chicot County Drainage District* v. *Baxter State Bank,* 308 U.S. 371. *Stoll, Chicot* and *Treinies,* v. *Sunshine Mining Co.,* 308 U.S. 66, indicate that if proceedings in the original action comport with due process many, *not* all, questions of judicial power become less important than preserving the finality of judgments. DuFief fails to cite *Kalb* v. *Feuerstein,* 308 U.S. 433, and *United States* v. *United States Fid. & Guar. Co.,* 309 U.S. 506, unanimous decisions by essentially the same Court. *Kalb* and *Fidelity* both recognize that there are some issues which *are* more important than the finality of judgments.

That these cases must be read together has been recognized by the Restatement of Judgments. DuFief quotes from the 1942 Restatement, Section 10, Comment a [pp. 7, 8], but fails to mention its Comment b lists factors for consideration in denyng the effect of *res judicata.*

Restatement (Second), Judgments has carved major exceptions to the finality of judgments, inter alia, as follows:

> **Section 15. Contesting Subject Matter Jurisdiction.**
>
> **When a court has rendered judgment in a contested action, the judgment precludes the parties from relitigating the question of a court's subject matter jurisdiction in subsequent litigation except if:**
>
> **(1) The subject matter of the action was so plainly beyond the court's jurisdiction that its entertaining the action was a manifest abuse of authority. . . .**[1]

The jurisdictional statement (at p. 18) applied the "black-letter" to this appeal, together with the following paraphrased and quoted excerpts from comment "d. Subject matter jurisdiction not expressly determined" from Restatement II of Jugdments, T.D. No. 6, pp. 154, 157-58.

In Section 15, Comment d, the Restatement II recognizes that when a belated contention about subject matter jurisdiction has some substantial merit, the adversary system has failed to bring forward a highly relevant issue in the original proceeding and the application of *res judicata* poses a genuine dilemma (pp. 157-58):

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[1]Restatement (Second) Judgments p. 149 (T.D. No. 6, 1979) p. 149. The tentative drafts were approved at the 1980 meeting of the American Law Institute, for publication, subject to editorial review by the reporter and advisers.

> "The question, therefore, is whether the public interest in observance of the particular jurisdictional rule is sufficiently strong to permit a possibly superflous vindication of the rule by a litigant who is underserving of the accompanying benefit that will redound to him. The public interest is of that strength only *if the tribunal's excess of authority was plain or has seriously disturbed the distribution of governmental powers or has infringed a fundamental constitutional protection.*" [Emphasis added.]

Here, in this appeal, the vindication would not be superfluous, as the question presented affects approximately half the states and involves not only a usurpation of power but also poses serious practical problems in the conduct of business by limited partnerships. Permitting a state court to exercise jurisdiction beyond the limits imposed by federal due process seriously disturbs the distribution of governmental powers among the states and infringes upon a fundamental constitutional protection of persons and property. This is particularly true in states such as Virginia where there is no appeal of right from a trial court's decision, and its ruling in favor of its own jurisdiction may be allowed to stand merely by denial of a Petition for Writ of Error without full argument or any kind of appellate opinion. Restatement II has recognized that one policy underlying the strength of the doctrine of *res judicata* is that, "there is virtually always available a procedure by which to obtain review of the original tribunal's determination of the issue [of subject matter jurisdiction], either by appeal or by injunction or extraordinary writ." Restatement (Second), Judgments, Sec. 15, Comment c (T.D. No. 6, 1979), p. 154.

Neither *Stoll* nor *Chicot,* supra at p. 2, held that an exercise of jurisdiction in violation of due process can be

validated by issue preclusion when such exercise was a manifest abuse of authority.

2. The cases cited by DuFief do not hold that a state may exercise jurisdiction over a non-resident partnership merely because a general partner resides in the forum state.

DuFief places great reliance on *Sugg* v. *Thornton,* 132 U.S. 524, and *Fidelity & Cas. Co. of New York* v. *Homan,* 116 So.2d 444 (Fla D.Ct.App. 1959). *Sugg* was a suit in Texas against a Texas partnership, with process served on a non-resident partner by "certified" mail. The Texas court seized and sold partnership assets in Texas but entered no judgment against the non-resident partners individually. The only question decided by this Court was one of fact —whether the evidence supported a finding that the partnership note was signed with authority of the partnership.

In *Homan,* the lower court held, consistent with the partner's contention here, that there was no jurisdiction over the subject matter; on appeal, the issue of subject matter jurisdiction was conceded by the parties. However, in holding that the court below should exercise jurisdiction under the averments in the complaint, the appellate court made it clear that it was not precluding the appellee from asserting defensive pleadings which would justify the lower court in refusing the exercise jurisdiction.

Cited cases involving the method of service of process are inapposite. The Virginia statute provides an acceptable method of service of process — it does not provide a constitutional basis upon which to predicate jurisdiction.

Although DuFief stresses the fact that the partner was a resident of Virginia, the Virginia statute requires only two inquiries: (a) whether the subject matter of the suit is a "partnership matter", and (b) whether the individual serv-

ed in Virginia is a general partner. Thus, under the Virginia statute, a court could exercise subject matter jurisdiction over a non-resident partnership having no contacts with Virginia by service on a non-resident general partner who happened to be present in Virginia at the time of service.

3. By emphasizing that a partnership is not a juridical entity, DuFief underscores the partner's contention that the questions presented are substantial and require resolution by this Court.

DuFief has conceded that the non-resident partnership conducted no business whatever in Virginia [p. 2]. DuFief's emphasis on the fact that a partnership is not a juridical entity like a corporation [pp. 9, 10], demonstrates that the questions presented are substantial both from a constitutional standpoint and from the point of view of the chaotic state of partnership law which the result urged by DuFief would create.

Prior to 1976, the Uniform Limited Partnership Act had no provision for the recognition of a foreign limited partnership in another state, and most states had no provisions for permitting the filing of the certificate of a foreign limited partnership. In fact some jurisdictions, such as the District of Columbia, specifically refuse to record certificates of foreign limited partnerships.[2]

Since a limited partnership is solely a creature of statute, it can have no legal existence beyond the limits of the jurisdiction where it is created unless the partnership is recognized by the foreign jurisdiction through satisfaction of that state's statutes and regulations. In short, a limited partnership, as an entity, cannot cross state lines. If a limited partnership formed in one state attempted to do

[2]"Foreign Limited Partnership: A proposed Amendment to the Uniform Limited Partnership Act," 47 S.Cal.L.Rev. 1174, 1189 (1974).

business in another, a new partnership would be formed by common law. Not having "substantially complied" with the foreign jurisdiction's statutory requirements for formation of a limited partnership, it could only be regarded as a common law general partnership, subjecting all partners, including limited partners, to unlimited liability. At best, even if the foreign partnership were recognized as a limited partnership, it would be a different limited partnership from the one in the state of its creation, and limited partners would be subjected to additional liability in the second state for the amount of their capital contributions.

This situation engendered "confusion and conflict beyond imagination,"[3] with endless complications for full and accurate disclosure of investment potential and investment liability under federal and state securities laws. If a limited partnership did business in more than one state, it was impossible to represent to potential limited partners that liability would be limited to the amount of their original contribution. It was partially in response to these problems that the 1976 amendments to the ULPA were promulgated.

The foregoing problems exist in cases where the limited partnership *is* transacting business in a foreign jurisdiction and attempting to comply with the requirements of that jurisdiction and as they relate to limited partnerships. In asking this Court to sustain the constitutionality of a partnership statute by holding that a partnership is automatically made a domiciliary of each state in which a general partner happens to reside [p. 13], DuFief seeks a result which would compound the already serious problems by extending them to states in which the partnership transacts no business or affairs and by subjecting limited partners to unlimited liability in those states.

[3]Kratovil & Werner, "Fixing up the Old Jalopy The Modern Limited Partnership under the ULPA," 50 St. John's L.Rev. 51, 67 (1975).

DuFief's citation [p. 10] of *Gt. So. Fireproof Hotel Co.*, 111 U.S. 499, a federal court diversity case on partnerships has only the narrow significance of limiting the diversity jurisdiction of Federal courts and is not a precedent to validate state court jurisdiction in partnership matters beyond the minimum contacts standard of due process. The legal fictin in diversity cases that a partnership is domiciled in every state in which a general partner resides makes it more difficult for a partnership to satisfy the test of the complete diversity of parties. The practical result is that much partnership litigation is confined to state courts. But state courts, as well as Federal courts satisfying the complete diversity test, must justify their jurisdiction by the constitutional standard of due process – the minimum contacts requirement of International Shoe and its progency.

DuFief [p. 12] "has no quarrel with the legal principals [sic] enunciated" in *International Shoe Co.* v. *Washington,* 326 U.S. 310 through *Shaffer* v. *Heitner,* 433 U.S. 186, "but contends that Appellant's reliance on them is sorely misplaced . . ." DuFief is silent on this year's decision in *Rush* v. *Savchuck,* 444 U.S. ____, 100 S. Ct. 571, on which the Jurisdictional Statement greatly relies at pp. 20-21. *Rush* is believed controlling on this appeal.

CONCLUSION

The Attorney General of Virginia has stated: "Having reviewed the Jurisdictional Statement, I do not deem it necessary for the Commonwealth to formally oppose jurisdiction" [Letter to the Honorable Michael Rodak, Jr., July 25, 1980]. Only DuFief seeks to persuade this Court to establish a precedent by declining to subject the Virginia statute to constitutional scrutiny.

Respectfully submitted,

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